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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1091

RALPH R. BENSON,
PETITIONER,

v.

STATE OF CALIFORNIA,
LELAND C. CARTER,
Probation Officer of Los Angeles County,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

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Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Second Appellate District, State of California, entered on December 10, 1965.

Opinions of the Courts Below.

No opinion was rendered by the state trial court either at the trial or upon the denial of the petition for writ of habeas corpus.

The opinion of the District Court of Appeal of the State of California upon the original appeal is reported as *People* v. *Benson,* 206 Cal. App. 2d 519, 23 Cal. Reptr. 908, a copy thereof being annexed to this petition as Appendix A, p. A-1. No opinion was rendered by the District Court of Appeal in denying the petition for writ of habeas corpus. See Appendix F, p. A-49.

No opinion was ever rendered by the Supreme Court of California. Hearing by said court was denied both on appeal and on habeas corpus leaving both judgments of the District Court of Appeal final and the highest court decisions that could be obtained in California in this case.

The memorandum opinion of the United States District Court is unreported, and is annexed hereto as Appendix B, p. A-19.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Benson* v. *California,* 336 F. 2d 791, and is annexed hereto as Appendix C, p. A-23.

Jurisdiction

This is the third petition for a writ of certiorari in this case on the issue of entrapment. The first petition sought review of the state appellate decision, *People* v. *Benson,* 206 Cal. App. 2d 519; cert. den. 374 U.S. 806. The second petition sought review of the federal appellate decision denying a federal writ, *Benson* v. *California,* 336 F. 2d 791; cert. den. 380 U.S. 951. Subsequently, the California Supreme Court disapproved of the state appellate decision in this case on the issue of entrapment in *People* v. *Perez,* 62 Cal. 2d 769, 776, footnote 2. A petition for a writ of habeas corpus was denied by the California District Court of Appeal on December 10, 1965. A petition for hearing by the California Supreme Court on January 6,

1966 was denied. The jurisdiction of this court is invoked under United States Code, Title 28, Section 1257 (3).

Question Presented

California law formerly denied standing to assert entrapment defense so long as defendant failed to admit guilt of the offenses charged. Subsequent to trial of instant case, California has made such defense available unconditionally. May California, consistent with due process and equal protection, refuse to retroactively apply such new rule to petitioner's case wherein such defense was not weighed and not available to petitioner at the time of the trial?

Constitutional Provision Involved

The Fourteenth Amendment provides:

> ". . .nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

Petitioner who waived jury trial was convicted by the California Superior Court of three counts of insurance claim fraud and he is now on probation. At the trial, evidence of unlawful entrapment was introduced:

1. Two undercover agents posing as accident victims employed petitioner to prosecute false claims which appeared legitimate (People's Exhibits 4 and 12).

2. Agent 1 was disabled and crippled, but not from an accident. He was limping and incoherent (R.T. 1028, 1034, 363, 46, 83, 757, 429, 945).

3. Agent 1 sent letters to petitioner falsely claiming injury and wage loss (People's Exhibit 12).

4. Agent 2 told petitioner he made 26 visits to his doctor when he made but 2. (R.T. 713, 714, 715, 741).

5. Agent 2 caused a consultant medical report to be sent to petitioner showing injury which was false (R.T. 988).

6. Agent 1 made a false report of injury to the state before retaining petitioner (R.T. 550-59 Defendant's Exhibits G and J).

7. Agent 2 deceived another attorney into accepting another false claim of injury about the same time (R.T. 920-940).

Although defense counsel argued entrapment, the trial court failed to make any express ruling or comment on the defense of entrapment.

In its decision affirming judgment, the state appellate court applied the law then existing: that entrapment defense was not available to petitioner since he denied commission of the crimes charged. (*People* v. *Benson,* 206 Cal. App. 2d 519, 532)

Twice petitioner has previously unsuccessfully sought certiorari from this Court on due process grounds. The California Supreme Court, since the last certiorari denial, has changed the rule concerning availability of entrapment defense to defendants who deny commission of the crime charged. The California Supreme Court disapproved of the appellate decision in this case. Petitioner applied to all of the California courts for a new trial by way of habeas corpus. His petitions have been denied and he has now exhausted his state remedies. His defense of unlawful entrapment remains unconsidered in the courts of his state.

The Federal Question Was Properly Raised and Preserved

The defense of unlawful entrapment was raised in the trial court: R.T. 30-36, 173, 182-183, 250-255; Rep. Part.

Tr. 48-49; C.T. p. 36. The trial court made no express ruling or comment thereon.

The Ninth Circuit Court of Appeals states in a footnote that the defense of entrapment had not been raised in the trial court. This is error. The defense was raised as revealed in the trial record set forth above. Additionally, the California District Court of Appeal has recently stated that to attempt to raise the defense of entrapment without conceding guilt would have been a futile gesture under the former state of the law.

> *People* v. *Marsden*, 234 Cal. App. App. 2d 796, 44 Cal. Reptr. 728, Appendix E, p. A-44.

The question of entrapment as an available defense at the time of the trial was dealt with in the State appeal in *People* v. *Benson*, 206 Cal. App. 2d 532, therefore:

> "There can be no question of the proper presentation of a federal claim when the highest state court passes on it."
>
> *Raley* v. *Ohio*, 360 U.S. 423, 436.

Constitutional claims under the 14th Amendment were presented in the state petitions for habeas corpus:

Before the Trial Judge: p. 1 and p. 4.

Before the Presiding Judge, Superior Court: p. 1 and p. 4.

Before the District Court of Appeal: p. 1 and p. 5.

Before the California Supreme Court: Petition for Hearing: p. 2 and p. 6.

In each court, the petition was denied without a hearing and without opinion.

Reasons For Granting the Writ

1. Writers of two recent law review articles believe the Supreme Court will decide that entrapment is a constitutionally protected defense under due process.

> "Now in its fiftieth year, the entrapment defense has been widely criticized as a failure. Its objective—preventing the police from turning innocent men into criminals—is almost universally accepted. But this objective has been frustrated by ambiguous standards, unresponsive appellate courts and prejudicial trial procedures. This Note will argue the basic objective of the entrapment defense is dictated by the Constitution. . .binding on the states as well as the federal government. . ."
>
> *The Serpent Beguiled Me and I Did Eat The Constitutional Status of the Entrapment Defense,* 74 Yale Law Journal 942, 943
>
> *Due Process of Law and the Entrapment Defense,* 1964 University of Illinois Law Forum 821

2. Shortly after the second denial of certiorari to this petitioner by this Court, the California Supreme Court changed the law of entrapment and granted new trials to two of its citizens. It stated that the defense of entrapment was essential to a fair determination of the cause and relevant to the issue of guilt. The defense could not be preconditioned by the state with an admission of guilt from the accused.

> *People* v. *Perez,* 62 Cal. 2d 769, 401 P. 2d 934, 44 Cal. Reptr. 326, Appendix D, p. A-37
> *People* v. *Marsden,* 234 Cal. App. 2d 796, 44 Cal. Reptr. 728, Appendix E, p. A-44

By refusing to grant petitioner likewise a new trial, California has denied equal protection and due process of law to him. His defense of entrapment by which he can show his innocence remains undetermined in the California courts—despite federal and state law requiring reopening of cases which have become final where *innocent persons* are still under restraint and were denied a defense at the time of the trial.

Gideon v. *Wainwright*, 372 U.S. 335
Linkletter v. *Walker*, 381 U.S. 618
In re Gaines, 63 Adv. Cal. 235

Conclusion

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

The People of the State of California, Plaintiff and Respondent, vs. Ralph R. Benson, Defendant and Appellant. Criminal No. 7764.

Filed Aug. 6, 1962.

Appeal from a judgment of the Superior Court of Los Angeles County, Frederick W. Mahl, Jr., Judge.

Cantillon & Cantillon, Richard H. Cantillon for appellant.

Stanley Mosk, Attorney General; William E. James, Assistant Attorney General; William B. McKesson, District Attorney; Harry Wood and Harry B. Sondheim, Deputy District Attorneys.

Benson, Isaac Matloff and Edwin T. Harder were charged by information with conspiracy to commit grand theft and to violate section 556[1] of the Insurance Code (count I), in count II with a violation of section 556, *supra*, on or about March 10, 1960, and in count III with another violation of section 556 on or about April 28, 1960. After the commencement of trial to a jury, Matloff and Harder entered guilty pleas to attempt to violate section 556. Trial without a jury was then continued as to Benson only; he was adjudged guilty on all three counts. The appeal is from the judgment (order granting probation) and the order denying a new trial.

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[1] Section 556 of the Insurance Code: "It is unlawful to: (a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance. (b) Prepare, make, or subscribe any writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim. Every person who violates any provision of the section is punishable by imprisonment in the State prison not exceeding three years, or by fine not exceeding one thousand dollars, or by both."

Benson is an attorney; Matloff, a chiropractor, and Harder, an osteopath. On December 11, 1959, one Buchholz was involved in a rear-end collision. He sustained no personal injuries, although one Orr became liable to Buchholz for property damage to Buchholz' car. Three days later Matloff came to Buchholz' home; he was referred to Buchholz by an employee of the agency where the car was taken for repairs. The employee had been promised $25 by Matloff for every rear-end collision case referred to him. Matloff told Buchholz, whom he had never previously met, that the latter "could make some money on this accident because it was a rear-end collision, and if I (he) would say I (he) had a whiplash, that there would be no way to prove otherwise." Buchholz was also told that Benson would be the attorney handling the case and that he would be contacted by Benson within a few days. Buchholz advised Matloff that he would think it over. Two days after Matloff's visit, a Mr. Potter from Benson's office called at Buchholz' home. He filled out some papers and asked Buchholz to sign them; Buchholz said he wanted to "sleep on it" before employing Benson. Buchholz then went to the police who, in turn, contacted the District Attorney's office; Buchholz was told to play along — or, in effect, to act as a decoy. Potter paid Buchholz a second visit about a week later. Buchholz signed certain papers and explained how the accident happened. Thereafter, Matloff came to Buchholz' house on six or seven occasions; only one treatment was given, however. Buchholz told Matloff that he was not hurt; but Matloff stated that the bigger his (Matloff's) bill, the bigger would be Buchholz' recovery. Benson admits that the medical bills and reports as to Buchholz were "undeniably false." One such bill stated that Buchholz had been given 26 treatments. It was forwarded by Benson on March 10, 1960, to Orr's insurance carrier. After the company requested an itemized bill, on March 23, a

more detailed bill was forwarded by Benson — it made reference to various dates when Buchholz had been assertedly treated by Matloff.

On March 4, 1960, Buchholz took Robert Meng, an investigator from the District Attorney's office, to see Matloff. Posing as a person who had been recently involved in a rear-end collision with one Hawkins, although such was not the fact, Meng told Matloff that he had not been injured; Buchholz had previously advised him, however, that he (Meng) might make some money and Matloff agreed. In this regard, Matloff stated: "You are always injured in a rear-end collision. You get a whiplash." When mention was made of getting an additional doctor, Matloff said that he and Harder had been working with Benson for quite some time; that Harder would give the same diagnosis after he had seen Matloff's report. Matloff took some X-rays; he then telephoned Benson who talked to Meng. Benson asked Meng if he was working; when Meng said "No," Benson said, "You were working." Meng replied, "Well, okay." Meng was afterwards seen by Harder. As in the instance of Buchholz, Benson now admits that Matloff and Harder submitted false reports for service rendered Meng. These bills and reports were forwarded by Benson to the Insurance carrier for Hawkins.

Although not specifically charged in the information, evidence was introduced (apparently without objection) that Benson had forwarded to still another insurance carrier a false report of Dr. Harder pertaining to one Villabisencio. It appears that Villabiscencio received a bill from Harder for 14 visits, whereas the latter had seen Villabisencio not more than 5 times. When Villabisencio telephoned Benson about the matter, Benson said: "Well, you sign it, I am your attorney, and if I tell you to sign it, you sign it; don't sign anything else unless I tell you." Villabisencio signed the bill; subsequently Benson submitted to the insurance company a bill similar to that signed by the client.

Much of the People's case against Benson consisted of certain recorded conversations he had with Buchholz and Meng. On January 14, 1960, Buchholz went to Benson's office on order of the District Attorney's office; prior thereto a miniphone was installed on his person. Benson told Buchholz that he was in touch with California Casualty, the insurance carrier for Orr, and that he would also be in touch with Matloff. Buchholz testified that in response to Benson's question he told appellant that he was not hurt.[2] In February or March Buchholz had another conversation with Benson, this time by telephone, wherein he told Benson that his neck and back were not injured.

On March 25 Meng telephoned Benson. The conversation was recorded, the transcription thereof being as follows:

"Office Girl: Hello, Mr. Benson's office.

"Mr. Meng: May I speak to Mr. Benson, please?

"Office Girl: Who is calling?

"Mr. Meng: This is Bob Meng.

"Office Girl: Bob Meng?

"Mr. Meng: Meng, M-e-n-g.

"Office Girl: Do you want to know when your case is coming on?

"Mr. Meng: No. I'd like to discuss something with him if I could.

"Office Girl: This isn't regarding a case, though, is it?

"Mr. Meng: Yes, it is.

"Office Girl: Will you hold the line a second, please.

"Mr. Meng: All right.

"Mr. Benson: Hello, Bob.

---

[2] When the tape recording was played to Benson, then under cross-examination, Buchholz was heard to say: "You know, there is nothing wrong with me, I don't want to get into any trouble." Asked if his memory was refreshed that Buchholz made such a statement, Benson replied: "Yes, he did." The recording was admitted into evidence without objection.

"Mr. Meng: Yes.

"Mr. Benson: Ralph Benson.

"Mr. Meng: Yeah; how are you?

"Mr. Benson: Okay.

"Mr. Meng: Listen, I got a phone call last night from this fellow Hawkins, the guy that hit me—

"Mr. Benson: Yeah, he's out of his mind.

"Mr. Meng: (Laughing)

"Mr. Benson: He's out of his mind.

"Mr. Meng: Well, what do you say—

"Mr. Benson: He wants to settle this for very little money.

"Mr. Meng: Uh-huh.

"Mr. Benson: Did he mention any money to you?

"Mr. Meng: No, he didn't, but he was—

"Mr. Benson: So that his company wouldn't be bothered.

"Mr. Meng: Well, he seems kind of shook up about it, and he's got me a little bit shook up because—

"Mr. Benson: Why — why should it shake you up?

"Mr. Meng: Well, see — you have talked to Matloff or Harder about this thing?

"Mr. Benson: Why?

"Mr. Meng: Well, I told them — you know I wasn't hurt actually, and I told Harris[3] that night — the night that he came out to my house—

"Mr. Benson: That's all right.

"Mr. Meng: Well—

"Mr. Benson: That's no problem.

"Mr. Meng: Well, what do you mean it's no problem, I mean, suppose I have to go to court with this guy, or something?

"Mr. Benson: I tell you what — you're upset.

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[3] Harris is an attorney, employed at that time by Benson.

"Mr. Meng: Huh?

"Mr. Benson: You sound like a girl who has just found out she's pregnant.

"Mr. Meng: Well — (laughing) can you, — I mean, you see my point, in other words—

"Mr. Benson: I see your point. I've been a lawyer 14 years, I can see your point.

"Mr. Meng: Well—

"Mr. Benson: Just forget it.

"Mr. Meng: Well—

"Mr. Benson: Look, I'll take care of it. I mean, this case can be settled for around $1500.

"Mr. Meng: Uh-huh.

"Mr. Benson: If you — if you want to feel that's not enough — that's too much money for you — this guy — other guy will probably give you $200 to forget it.

"Mr. Meng: Uh-huh. Well, whatever you say, you're the boss; but I wanted to talk to you about the case, as I say—

"Mr. Benson: All right, * * * from work?

"Mr. Meng: Huh?

"Mr. Benson: You lost any time from work?

"Mr. Meng: Did I loose anytime from work?

"Mr. Benson: Yeah.

"Mr. Meng: No, see, I told Joe Harris that night, see, I wasn't work — huh?

"Mr. Benson: That's okay. Now, look don't worry about this. Just don't talk to anybody but me and Dr. Matloff, and quit talking to the other guy.

"Mr. Meng: Okay, you're the boss, whatever you say.

"Mr. Benson: Okay?

"Mr. Meng: Okay.

"Mr. Benson: I'll be in touch with you.

"Mr. Meng: Righto.

"Mr. Benson: Good-bye.

"Mr. Meng: Goodbye."

On April 18 Matloff signed a medical report pertaining to Meng. Various questions in the report were answered falsely — these false answers, according to Meng, he did not furnish to Matloff. The next day, pursuant to Matloff's suggestion, Meng took one or two copies of this report to Benson's office. At that time he had a conversation (likewise recorded) with the appellant who, while under direct examination, read its transcription into evidence:

"Mr. Meng: Well, listen, you undoubtedly talked to Joe Harris about this. Like I said Matloff called me and asked me to come out and fill this thing out with him, which is fine except he has changed a few things on it, and that's fine as long as I don't have to go to court, but, . . ., he's got nothing but a bunch of lies on that thing.

"Mr. Benson: What are his lies?

"Mr. Meng: Well, to begin with, he's got a different date on there as to the date that Joe came out to see me, and Joe came out the same day that I saw him for the first time.

"Mr. Benson: Makes it seem though you didn't.

"Mr. Meng: Right.

"Mr. Benson: What's the date?

"Mr. Meng: I don't remember exactly.

"Mr. Benson: Did you go to the doctor the next day?

"Mr. Meng: No, I didn't.

"Mr. Benson: Well, that's something you and the doctor must decide between yourselves in matters of your own conscience.

"Mr. Meng: Well, as I say, everything's fine as long as I don't have to go to court because . . ., that's all I got to do is get court *(sic)* in a lie or something and I'd spend ten years in jail."

"Mr. Benson: Well, I don't know how many times you have seen him. I wasn't there. Whatever it is, it is, and

I go by and submit to the company whatever is said to me by the doctor. If you feel this is a lie, we'll drop the whole case right now."

"Mr. Meng: Well, I—

"(then Mr. Benson says something unintelligible.)

"This thing is dropped.

"Mr. Meng: Whatever you think, as I say I don't know, like I told Joe the night he came out to fill out this accident form, or whatever the heck it is, I told him then the same thing I told Matloff, that I wasn't actually hurt in the thing.

"He said, 'Well, don't talk to me. Talk to Matloff and Mr. Benson.'

"And I said, 'All right,' and when I talked to you on the phone—

"Mr. Benson: I am not going to participate in a fraud. If this is a correct — if you and the doctor say this is correct, I'll go along with you. If you say it is incorrect—

"Mr. Meng: Well, as I say—

"Mr. Benson: I am not going to participate in a fraud. I never had for 14 years and I don't intend to.

"Mr. Meng: Fine. (and then something unintelligible)

"Mr. Benson: If you say this is untrue, let's forget the whole thing. You figure it out for yourself.

"Mr. Meng: I don't know.

"Mr. Benson: What's your age?

"Mr. Meng: Thirty-five.

"Mr. Benson: Thirty-five and you haven't learned anything about life yet.

"Mr. Meng: Haven't learned anything about life?

"Mr. Benson: Yeah, life.

"Mr. Meng: Yeah, I learned something about life.

"Mr. Benson: All right. Did you get a third copy of this?

"Mr. Meng: No. He said he wanted to keep one copy and send one copy to Dr. Harder.

"Mr. Benson: It's all right.

"Mr. Meng: Yeah, everything was fine until this guy Hawkins called me up and then—

"Mr. Benson: Who's Hawkins?

"Mr. Meng: That's the guy that hit me.

"Mr. Benson: What did he say?

"Mr. Meng: He wanted to know what the heck I was doing and I said, 'What do you mean, what am I doing?' And he said, 'Well, I got a letter from my insurance company saying that somebody's filing suit against me,' and I said, 'Buddy, I don't know what you're talking about.' Remember I called you and told you he called me?

"Mr. Benson: Yeah. So what? Hawkins is not supposed to call you.

"Mr. Meng: Huh?

"Mr. Benson: Hawkins is not supposed to call you.

"Mr. Meng: Well, as I say, I've never had that happen to me before and I didn't know what was going on.

"Mr. Benson: At the time of this collision you were unemployed looking for work.

"Mr. Meng: Right.

"Mr. Benson: You earned about $150.00 a month.

"Mr. Meng: $150.00 a week.

"Mr. Benson: A week.

"Mr. Benson: When did you finally get back to work?

"Mr. Meng: About two and a half weeks, February 18th.

"Mr. Meng: I haven't actually, I've had a few odd jobs,—

"The Witness: (Reading)

"My wife is still working, thank God, but I've only had a couple of odd jobs.

"Mr. Benson: How many children do you have?

"Mr. Meng: Beg pardon?

"Mr. Benson: How many children?

"Mr. Meng: Two. Boy and a girl.

"Mr. Benson: When was the first time you went back to work after February 18th.

"Mr. Meng: About three weeks ago. I had a job for four days.

"Mr. Benson: What day did it start?

"Mr. Meng: Beg pardon?

"Mr. Benson: What day did it commence?

"Mr. Meng: Have you got a calendar?

"Mr. Benson: Right.

"Mr. Meng: Well, let's see. Today is the — what's today? The 19th.

"Mr. Benson: Well, they've got you down for one week so I'll have to turn it in. Well okay as soon as I get the report from Dr. Harder I'll submit a copy to you and give a copy to the company and we'll have this case settled.

"Mr. Meng: All right. Will you get in touch with me then?

"Mr. Benson: Okay.

"Mr. Meng: Do you want me to call you or what?

"Mr. Benson: No, I'll be in touch with you. I've got your number.

"Mr. Meng: well, as I say I'm not adverse to making a buck, but you know.

"Mr. Benson: Yeah.

"Mr. Meng: As long as I don't have to go to court, I don't care.

"Mr. Benson: Okay.

"Mr. Meng: Okay, thanks very much."

On April 28, Benson mailed to Hawkins' insurance company Matloff's report, testified to by Meng, and a report from Harder. Matloff's report included the following answers to the following questions: "How many times have

you treated the patient? 26 times. What is the precise location, nature and extent of the injury as revealed by your examination? Occipital headache, neck tension, sacroiliac tension. What is the period of time patent has been confined at home or in hospital? One week."

Benson testified on his own behalf. He stated that he relied upon the medical reports and oral information furnished him by his clients' doctors. The ultimate issue for determination, therefore, was appellant's knowledge or lack of knowledge of the falsity of the Matloff and Harder reports. He challenges the adverse finding in this regard; we now take up this first assignment of error.

Although appellant concedes that the resolution of conflicting inferences is for the trier of fact, he now asks this court to say that as a matter of law an inference of guilt cannot be drawn from the evidence adduced. That being so, he further contends, "the element of wilfulness essential to each offense is totally lacking."[4] Furthermore, he says the conversations out of his presence between Buchholz, Meng, Matloff and Harder were inadmissible since the existence of a conspiracy cannot be inferred unless appellant had the required knowledge of the falsity of the claims; on the other hand, it is conceded, the existence of a conspiracy can be inferred if appellant had such required knowledge.

It has been stated that in prosecutions for violating section 556 of the Insurance Code, "The basis of the offense alleged is the defendant's intent to defraud . . ." (*People v. Turley,* 119 Cal. App. 2d 632, 636.) A person who knowingly or wilfully submits a claim, knowing it to be false, necessarily does so to defraud. (*People v. Haydon,* 106 Cal. App. 2d 105.) Generally, "Whether (a defendant) made

[4] "The word 'wilfully' as used in criminal statutes implies a purpose of willingness to commit the act (Pen. Code, Sec. 7, subd. 1), and although it does not require an evil intent, it implies that the person knows what he is doing intends to do and is a free agent." (*In re Trombley*, 31 Cal. 2d 801, 807.)

these representations in good faith or whether he made them knowing they were false, or in reckless disregard of the truth and without information justifying the belief, (are) questions for the (trial court). Intent cannot always be proved by direct evidence. Many times it has to be determined from a consideration of all the circumstances surrounding the doing of an act . . . An intention to defraud is an essential element of the charged offenses, but such intention is inferable from all the facts of the case and need not be substantively proved . . ." (*People v. Henderson,* 79 Cal. App. 2d 94, 117-118.) See also *People v. Burnham,* 194 Cal. App. 2d 836, 841-842; *People v. Proctor,* 169 Cal. App. 2d 269, 279.) Although his counsel has extensively argued that appellant's case is in effect *sui generis,* we are satisfied that the present point is governed by the familiar rules stated above. It has been said countless times, and was rather recently reiterated by the Supreme Court, that, "The choice of which inference is to be drawn from the facts, where more than one reasonable inference is possible, is the function of the jury." (*People v. Sweeney,* 55 Cal. 2d 27, 51.) That the challenged inference of actionable knowledge or scienter and reckless disregard of the truth was reasonably drawn is clear from the following facts.

With respect to the Buchholz transactions, Benson was advised on two separate occasions that Buchholz was not injured. Thus, on January 14 (the recorded conversation) Buchholz told appellant that he was not hurt or injured. Again, in February or March, Buchholz telephoned appellant and stated that his neck and back were not injured. Notwithstanding these unequivocal statements, appellant shortly thereafter forwarded the medical reports to the responsible insurance carrier; such action belies a cautious concern for the true facts which is expected of an attorney with 14 years in the practice, most of which practice (appellant stated) was in this particular field. A different pic-

ture is portrayed in appellant's briefs, wherein he points to several asserted discrepancies in the Buchholz testimony, recorded and otherwise; other arguments are directed toward the lack of credence to be accorded this witness. Despite a painstaking effort in this regard, all these arguments were for resolution by the trier of fact. Appellant's testimony, on the other hand, reflects more than mere discrepancies; it contains an outright contradiction, upon cross-examination, of what he testified to while under direct examination. (See footnote 2 herein.) When false testimony is thus given, it is evidence of consciousness of guilt from which, along with other evidence, a determination of guilt may be inferred. (*People v. Wayne*, 41 Cal. 2d 814, 823.) Indeed the inference in question does, and should, carry more weight when the false testimony comes from the lips of an attorney; this, despite appellant's claim that there was no "intentional falsity." The area of interrogation related to pivotal points in the case and not minor or incidental matters.

With respect to the Meng transaction, again Benson was twice informed of the true facts. On March 25, Meng advised appellant by telephone that he "wasn't hurt actually," and Benson replied. "That's all right." Though thus previously advised, Benson in the same conversation later said: "That's no problem," "just forget it," and "look I'll take care of it." The entire conversation has heretofore been quoted; considered as a whole, it supports the trial court's implied conclusion that appellant had little concern for his responsibilities in the premises and was determined, recklessly or fraudulently, to proceed forthwith with the processing of his client's claim. Meng again informed Benson of the falsity of his claim at appellant's office on April 19 — this conversation has also been heretofore quoted *in toto*. Meng told appellant that Maltoff's report contained "nothing but a bunch of lies" which, of it-

self, warranted some restraint on appellant's part; the report, devoid of any changes, was nevertheless mailed to the responsible insurance company. It is, of course, true that in the course of this conversation Benson told Meng that he "was not going to participate in a fraud, . . . never had for 14 years . . . don't intend to." He also stated: "Well that's something you and a doctor must decide between yourselves in matters of your own conscience." A scrupulous concern for his duties as an attorney would have dictated that appellant not thus stand aside and let others determine where the truth lay; certainly appellant's position, thus revealed, seems out of harmony with his statutory duty, "To employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth . . ." (Bus. & Prof. Code, Sec. 6068(d)). Situations will arise where there is an *honest* difference of opinion, but this is not such a case.

As noted earlier, appellant concedes that the existence of a conspiracy can be inferred if the evidence shows that he had the knowledge requisite to the commission of the substantive offense; he also concedes, apparently not challenging the fact that a *prima facie* case was made out, that the declarations and statements made by his coconspirators outside his presence would be admissible. (*People v. Robinson*, 43 Cal. 2d 132, 137.) These statements we briefly refer to. On February 5, Matloff told Buchholz: "Well, you see, the point is the insurance doesn't know what shape you're in, and talk about Benson, he doesn't care whether you're in bed our out of bed. It wouldn't make any difference." On March 4, Matloff told Meng that he and Harder had been working with Benson "for quite some time"; that Harder would see his X-rays and give the same diagnosis. On March 22, Meng advised Harder that neither he nor Buchholz had been injured in any accident. Harder then told Meng not to worry about it because Benson would see

to it that neither of them would have to go to court; he also told Meng that he had been working with Benson "for about three years." On March 23, Meng told Matloff that Harder had not examined either Buchholz or himself; Matloff replied that it didn't make any difference because Harder had worked with him and Benson and knew what to do. This and other evidence, unnecessary to relate, clearly shows a corrupt agreement among the parties concerned (accompanied by overt acts) to commit the substantive offenses charged; that is the gist of the crime of conspiracy.

As his next assignment of error, appellant contends that he was entrapped; he does so notwithstanding his consistent denial that the crimes complained of were committed. His position is similar to that of the appellant in *People v. Lee*, 9 Cal. App. 2d 99, where Lee denied that any sale of contraband was made or that he had any narcotics in his possession, but still argued entrapment. At pages 109, 110, the court there said: "It is our understanding that the defense of entrapment is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is being prosecuted. *The invocation of the defense necessarily assumes that the act charged as public offense was committed.*" (Emphasis added.) The holding in *Lee* was followed in *People v. Gelardi*, 77 Cal. App. 2d 467, 477, which quotes the language of the court above emphasized; the Supreme Court without a dissenting vote thereafter denied a hearing in *Gelardi*. Later cases in accord include *People v. Polsalski*, 181 Cal. App. 2d 795. Appellant claims that the declaration in *Polsalski* with reference to entrapment is dictum; dictum or otherwise, the law seems clear that appellant's position is inconsistent, and furthermore no California case is cited in support of the present assignment. Under the circumstances, we need not discuss the additional claims (although

neither is tenable) that appellant was *in fact* entrapped or that the evidence establishes entrapment as a matter of law.

As his next contention, appellant argues he could not be convicted of violating section 556 of the Insurance Code because neither Buchholz nor Meng, as distinguished from a policyholder, had a contract of insurance with the companies to whom the claims were presented; this is not the first time such a contention has reached our reviewing courts. As provided in the statute (footnote 1), the false or fraudulent claim must be for the payment of a loss "under a contract of insurance." The claims of Buchholz and Meng, says appellant, were *ex delicto* and not *ex contractu,* particularly in the absence of evidence that the policies in question gave either of the supposedly injured persons direct rights inuring to his benefit. This later type of policy is encountered in *Connell v. Clark,* 88 Cal. App. 2d 941, and *Giordano v. Amer. Fid. & Cas. Co.,* 97 Cal. App. 2d 309, being written pursuant to the direction of statute or ordinance; there are also cases where the argument has been that the contract of insurance was for the benefit of unnamed third persons. (See generally *Johnson v. Holmes Tuttle Lincoln-Mercury, Inc.,* 160 Cal. App. 2d 29.) Ordinarily, however, judgment must first be secured against the insured before the injured person has a right of action against the insurer on the policy. (Ins. Code, Sec. 11580.)

It was pointed out earlier that the gravamen of the substantive offense is the defendant's intent to defraud. The Legislature realistically provided in the concluding paragraph of section 556 that "*Every* person who violates any provision of this section is punishable by imprisonment . . ." (Emphasis added.) In turn, we propose to be realistic in our interpretation of its coverage, particularly in the light of the circumstances at bar. It is a matter of common knowledge that insurance companies negotiate settlements directly with injuried parties or their attorneys because of

the liability of their insured. Benson testified that he sent letters to both companies, as well as their insured (Orr and Hawkins), stating that all communications respecting the claims should be sent to him directly. Benson was no neophyte in this area of practice — it represented, he stated, about 60% of his professional activities. The insurance companies subsequently dealt with appellant directly — in line with customary practice and pursuant to Benson's instructions.

Furthermore, appellant cites no California authority to sustain his position on the specific point in question save for a New York case (*People v. Learman,* 121 N. Y. S. 2d 388) the reasoning of which we are not obligated to follow. In California, however, there is precedent for the respondent's answer to the present ingenious argument. *People v. Grossman,* 28 Cal. App. 2d 193 (hearing by the Supreme Court denied) likewise involved a violation of section 556; it also involved a situation where there was no privity between the defendants and the insurance carrier. The defendants included a doctor and a lawyer, and the conviction was affirmed even though the claim was made on behalf of a third party who had no rights under the contract of insurance alleged in the indictment. Only one defendant appealed. Said the court: "The defendant seems to contend that prosecution was bound to show that the contract of insurance . . . imposed liability upon the insurer. The first answer is that prosecution made the showing. The second answer is that the gravamen of the offense alleged was the defendant's intent to defraud. That intent did not depend solely on the legal obligation, if any, arising out of the said contract. (Citation.)" (p. 202) Rather recently in *People v. Reed,* 190 Cal. App. 2d 344, we had occasion to express our agreement with the treatment of the problem in *Grossman;* appellant has told us nothing which serves to change our views in that regard.

Appellant's final point is that there was an unreasonable search and seizure. He charges that Buchholz and Meng acted as "decoys" and that the various recordings obtained by use of the miniphone were inadmissible. There is merit to neither claim. See *People v. Wojahn,* 169 Cal. App. 2d 135, 142 (recorded conversations); *People v. Lagomarsino,* 97 Cal. App. 2d 92, 97 (decoys).

For the reasons stated the judgment (order granting probation) and the order denying a new trial are affirmed.

Lillie, *J.*

We concur:

Wood, *P. J.*
Fourt, *J.*

APPENDIX B.

Order Denying Petition for Writ of Habeas Corpus.

United States District Court, for the Southern District of California, Central Division.

Ralph R. Benson, Petitioner, vs. People of the State of California, Peter Pitchess, Sheriff of the County of Los Angeles, Leland Carter, Probation Officer of the County of Los Angeles, Respondent. No. 63-1267 HW.

Ralph R. Benson was charged by Information in the Superior Court of the State of California, in and for the County of Los Angeles, with conspiracy to commit grand theft and to violate § 556 of the Insurance Code of the State of California.

Trial was had without a jury, and defendant was found guilty by the Court. The District Court of Appeal affirmed the judgment of the Superior Court. Petition for rehearing was denied; and a petition for hearing by the Supreme Court of the State of California was also denied. The United States Supreme Court denied certiorari.

After exhaustion of available state remedies, Ralph R. Benson now files with this court a petition for writ of habeas corpus, alleging the California courts denied him the right to have his case heard under state procedures conforming with the requirements of the Fourteenth Amendment to the United States Constitution. Answer to the petition for writ of habeas corpus was duly filed by respondent, State of California, and the matter came on regularly for hearing before this court.

Review of the entire record has been made—that of the state trial court, the appellate proceedings, and the proceeding before the United States Supreme Court. Examination of the records and files in this matter discloses no denial of due process to the petitioner herein; and this Court is further of the opinion that petitioner has attempted to

create substantial federal questions without evidence or law to support his contentions.

State prisoners (having exhausted appellate procedures in state courts), in filing petitions for writs of habeas corpus in federal courts to attack state court judgments, have presented many complex and varied problems to the federal courts. Although it is the duty of a federal court to examine the entire record of the state court proceedings, that examination is limited to the ascertainment of whether it appears petitioner has been denied any right accorded by the Constitution of the United States.

In *Grundler v. State of North Carolina*, 283 F.2d 798 (Fourth Circuit), the Court said, at page 800:

> "The appellants argue that their trial in the state court was so unfair as to constitute a denial of due process of law under the Fourteenth Amendment to the United States Constitution. In support of this, they point to alleged errors in the admission and exclusion of evidence, * * * .
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> "* * *
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> "* * *
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> "We think that the transcript of the trial demonstrates that the evidence was sufficient. Even if we entertained doubts about this, there would be no basis for a federal court in a habeas corpus proceeding to undertake a broad review of the conviction in the state court. There is a difference between a conviction based upon evidence deemed insufficient as a matter of state criminal law, and one so totally devoid of evidentiary support as to raise a due process issue. It is only in the latter situation that there has been a violation of the Fourteenth Amendment, affording the state prisoner a remedy in a federal court on a writ of habeas corpus.
>
> "* * *

"* * *

"The points made in the present proceeding all pertain to state law, and in the context of the trial we find no indication of fundamental unfairness. We express no opinion as to the state court's resolution of the issues raised. Even if we were to disagree, we could not intervene by habeas corpus, when the alleged errors are of a character that cannot reasonably be said to involve a deprivation of constitutional rights. Normally, the admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented. The role of a federal habeas corpus petition is not to serve as an additional appeal."

In *Harrison v. Boles*, 307 F. 2d 928 (Fourth Circuit), the Court stated, at page 931:

"* * * the appellant contends first that the evidence at his trial was insufficient to support a verdict of murder in the first degree * * *.

"We do not think that these contentions should be sustained. They are based on the assumption that a prisoner who has been convicted of a crime and sentenced to prison after a trial under the forms of law may thereafter have a review of the proceedings at the trial by filing a petition of habeas corpus. This assumption is not tenable. It is settled by numerous decisions that errors of fact or law committed during the trial of a criminal case, which do not involve the denial of a constitutional right, may be reviewed only on appeal and not in a habeas corpus proceeding. * * *"

In *Schlette v. People of State of California*, 284 F.2d 827 (Ninth Circuit) the Court said, page 834:

> "* * *. Attacks upon the sufficiency of the evidence and the veracity of witnesses cannot be challenged through the medium of habeas corpus, but must be raised by appeals. [Citation.] The state adjudication of factual questions will be relied upon by federal courts. [Citation.] Where the basic facts are conflicting and those facts have been tried and adjudicated against petitioner without a vital flaw in the process of ascertaining such facts in the trial court, the federal court will accept that determination. * * *"

And in *Wilson v. State of Nebraska*, 316 F. 2d 84 (Eighth Circuit), the Court states the rule as follows, at page 86:

> "* * *, it has long been established that sufficiency of the evidence and veracity of witnesses cannot be challenged through the medium of habeas corpus but must be raised by direct appeal. * * *"

In the case at bar there was a direct appeal by defendant. In that appeal (*People v. Benson*, 206 Cal. App. 2d 519) petitioner raised the issue of entrapment and the issue of unconscionable search and seizure, two of the issues relied upon by him in the instant proceeding for writ of habeas corpus.

Review of the entire record in the trial and appellate courts discloses nothing therein to indicate the case was not fairly tried; and there is nothing in the record to indicate defendant was denied the rights guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

The petition for writ of habeas corpus is denied.

Dated: Nov. 26th, 1963.

Harry C. Westover
United States District Judge.

APPENDIX C.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Ralph R. Benson, Petitioner-Appellant, vs. People of the State of California; Peter Pitchess, Sheriff of Los Angeles County, and Leland Carter, Probation Officer of Los Angeles County, Respondents-Appellees. No. 19,069.

[September 24, 1964].

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Jertberg, Circuit Judges, and McNichols, District Judge.

Jertberg, Circuit Judge:

This is an appeal from a judgment of the United States District Court for the Southern District of California, Central Division, denying the petition of Ralph R. Benson, appellant herein, for a writ of habeas corpus. Jurisdiction of the District Court is based upon 28 U.S.C. § 2241(a). This court has jurisdiction to review on appeal a final order of the district judge refusing to issue a writ of habeas corpus when a certificate of probable cause has been granted. (28 U.S.C. § 2253.) Such certificate was granted in this case.

An information was filed in the Superior Court of the State of California, in and for the County of Los Angeles, against appellant, an attorney at law, and two co-defendants, one Isaac Matloff, a chiropractor, and one Edwin T. Harder, an osteopathic physician. In Count I of the information all three were charged with conspiracy to commit grand theft and to violate Section 556 of the California Insurance Code.[1] Count II charged all three with a viola-

[1] Section 556 states as follows:
"It is unlawful to:

tion of Section 556 of the Insurance Code on or about March 10, 1960. Count III charged another violation of Section 556 on or about April 28, 1960.

At approximately the midway point in the jury trial, Matloff and Harder entered pleas of guilty to a charge of attempting to violate Section 556 of the California Insurance Code, a lesser but necessarily included offense to that set forth in Count III of the information. Upon such occurrence the appellant waived trial by jury and the trial continued as a trial to the court. Upon close of the trial the judge adjudged appellant guilty on all three counts of the indictment. Appellant's motion for a new trial was denied, sentence was suspended, and appellant was granted probation for five years on condition that he first serve one hundred eighty days in jail and pay a fine of $5,000.00.

Appellant duly appealed to the District Court of Appeals of the State of California which affirmed the judgment of the trial court. See *People v. Benson,* 206 Cal. App. 2d 519, 23 Cal. Rptr. 908. Petition for rehearing of the appeal was denied and a petition for hearing before the Supreme Court of the State of California was denied. Petition for certiorari to the United States Supreme Court was denied. (374 U.S. 806.) Petition for rehearing of the order denying certiorari was likewise denied. (375 U.S. 870.)

Appellant then filed his petition for habeas corpus in the District Court. The District Court issued an order to show

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"(a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance.

"(b) Prepare, make, or subscribe any writing with intent to present or use the same, or to allow it to be presented or used in support of any such claim.

"Every person who violates any provision of this section is punishable by imprisonment in the State prison not exceeding three years, or by fine not exceeding one thousand dollars, or by both."

The defendants were charged with violating both subdivisions (a) and (b) of this section in Counts II and III of the information.

cause to the Sheriff of Los Angeles County who filed a return denying that the appellant was in any way illegally restrained of his liberty for any of the reasons set forth in the petition, or for any other reason. The hearing on the petition was heard by the District Court and a set of exhibits which constituted a record of the entire trial and appellate proceedings hereinbefore outlined was received in evidence. After hearing, the District Court denied the writ of habeas corpus. The District Court filed a written memorandum and order.

The facts, largely undisputed, are set forth in great detail in the opinion of the District Court of Appeals of the State of California *(People v. Benson, supra.)* The interested reader is referred to that opinion for the detailed statement of the facts. For that reason we deem it unnecessary to restate them here in great detail. In skeletonized form it appears as follows: One William Bucholz was involved in a rear-end collision while driving his automobile. An employee of the garage to which the car was taken for repairs notified Matloff of the rear-end collision responsive to Matloff's offer of $25.00 for such information. Matloff paid an uninvited visit upon Bucholz at his residence and told him if he would say he had sustained a whiplash injury there would be no way to prove otherwise. Bucholz told Matloff that he had not been injured but Matloff told Bucholz that appellant, an attorney, would be in touch with him in the next few days. Bucholz said he would think it over. He then telephoned the police department and subsequently became a decoy for the District Attorney's Office. Pursuant to a call by Matloff, Potter, a young law clerk working in appellant's law office, was sent to the Bucholz residence. Bucholz told Potter that he wanted to sleep on it before he engaged appellant as his attorney. Potter tore up the papers he had brought for Bucholz to sign, and left. After the District Attorney's Office had installed recording equip-

ment in the Bucholz residence, Bucholz telephoned appellant saying he wished to speak to Potter again. During Potter's second visit, Bucholz explained how the accident happened and again told Potter he was not injured to which Potter replied, "then there is no personal injury case."

Matloff came to Bucholz' residence on six or seven occasions but administered only one treatment. Matloff's bill reflected twenty-six treatments. Matloff explained the bigger the bill the bigger would be Bucholz' recovery. Appellant forwarded Matloff's medical bills and reports to the insurance carrier for the other party to the rear-end collision.

Later Bucholz called appellant and made an appointment to see him about the case. Bucholz kept the appointment wearing a Minifon. During the course of the recorded conversation Bucholz told appellant he was not injured. This statement was repeated again by Bucholz in a later phone conversation with appellant.

Later Bucholz, accompanied by Robert Meng, an investigator for the District Attorney's Office, called upon Matloff. Posing as a person who had been recently involved in a rear-end collision [although such was not the fact], Meng told Matloff that he had not been injured but Bucholz advised him that he might make some money, to which statement Matloff agreed. At such visit Matloff stated: "You are always injured in a rear-end collision. You get a whiplash." On the same occasion Matloff stated that an additional doctor would lend greater support to Meng's claim of injury and treatment. Matloff stated that he and Harder had been working together with appellant for some time and that Harder would give the same diagnosis. Matloff then telephoned appellant who talked to Meng. Appellant asked if Meng was working. Meng said "No." Appellant replied, "You were working." Meng replied, "Well, okay."

Later Meng telephoned appellant. The conversation was recorded. The conversation was lengthy and is set forth in *People v. Benson, supra.* During that conversation Meng told appellant that he hadn't been hurt in the rear end collision and that he had lost no time from his work.

Later Meng telephoned appellant and arranged for an appointment at appellant's office. When Meng appeared at appellant's office he was wearing a Minifon which recorded the conversation. In substance, appellant stated that if Meng and the doctor were willing to say that the facts contained on Matloff's medical forms were correct, he was willing to go along with it. Meng again told appellant he was not injured. Appellant thereafter submitted the false bills and medical reports of Doctors Matloff and Harder to Meng's insurance carrier.

Evidence was also introduced, without objection, that appellant had forwarded to still another insurance carrier a false report of Harder pertaining to one Villabisencio. It appears that Villabisencio received a bill from Harder for fourteen visits, whereas the latter had seen Villabisencio not more than five times. When Villabisencio telephoned appellant about the matter, appellant said: "Well you sign it, I am your attorney, and if I tell you to sign it, you sign it; don't sign anything else unless I tell you." Villabisencio signed the bill which appellant submitted to the insurance carrier.

Appellant's first contention is that the conversations which took place in appellant's office between appellant and Bucholz and appellant and Meng, and transcriptions of the recordings of such conversations, should have been excluded by the California trial court on the ground that they were the fruits of an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States, and compelled appellant to be a witness against himself, and de-

prived him of his liberty without due process of law in violation of his Fifth and Fourteenth Amendment rights. Appellant makes no contention that the trial court should have excluded, on the same ground, the telephone conversations between appellant and Bucholz and appellant and Meng, and the transcriptions of the recordings made of such conversations.

Under recent Supreme Court decisions it is clear that the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment render inadmissible in a state criminal trial all evidence obtained as a result of an illegal search and seizure, *Mapp v. Ohio*, 367 U.S. 643 (1961), and that the legality of a state search and seizure is to be measured, for purposes of the exclusionary rule, by the "fundamental criteria" of the Fourth Amendment, *Ker v. California*, 374 U.S. 23 (1963). Since the exclusionary rule is itself a Constitutional dictate, *Mapp v. Ohio, supra*, the question of illegal search and seizure by state authorities of evidence for use in a state criminal trial is cognizable by the federal courts on application for a writ of habeas corpus.

Appellant urges: (a) that his consent to the entries into his office by Bucholz and Meng was obtained through fraud and misrepresentation in that neither one was a "real" client, neither one suffered injuries which would form the basis of claims against insurance companies, neither one was under the treatment of doctors and Meng had not been involved in an automobile accident; and (b) that such fraud and misrepresentation vitiated his consent to such entries, thereby causing such entries to be in derogation of the rights guaranteed to him by the Constitution of the United States; and (c) finally, that the conversations held between appellant and Bucholz, and appellant and Meng, and the transcriptions of the recordings of such conversations should have been excluded on the ground that

they were the fruits of an unreasonable search and seizure and compelled appellant to become a witness against himself.

It is to be noted that at the time such consents to entry were given by appellant, he was aware that neither Bucholz or Meng had suffered injuries in any automobile accident. Appellant was not aware that Meng had not been involved in an automobile accident, nor was he aware that Bucholz was acting as a decoy and Meng was acting as an undercover agent for the District Attorney. Nor was he aware, at the time the conversations took place, that both Meng and Bucholz were wired for sound in the form of a concealed Minifon which each was wearing.

It is to be further noted that no tangible evidence was taken from appellant's office by either Bucholz or Meng, neither testified to any observations made by them while in appellant's office, nor was there any physical intrusion into the walls, furniture or equipment in the office by electronic or other devices which would permit conversations held therein to be overheard by persons other than those in the office. The only purpose which was served by the recordings of the conversations held in appellant's office was to furnish coroboration of the testimony of Bucholz and Meng.[2]

Before passing upon the validity of appellant's contention was will first review Appellate and Supreme Court decisions in the area. In *Gouled v. United States*, 255 U.S. 298 (1921), a private in the Army, attached to the Intelligence Department, and a business acquaintance of the defendant, Gouled, under direction of his superior officers, pretending to make a friendly call upon Gouled, gained admission to his office and in his absence, without warrant

[2] See dissenting opinion of Mr. Justice Brennan in *Lopez v. United States*, *infra*, at p. 448 to the effect that Minifon recordings are independent third-party evidence.

of any kind, seized and carried away several documents. One of these documents belonging to Gouled was introduced in evidence. It was held that it was the fruit of an unlawful search and seizure. The court stated at page 306:

> "* * *, whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or though social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence falls within the scope of the prohibition of the 4th Amendment, * * *"

In *Olmstead v. United States*, 277 U.S. 438 (1928), evidence obtained by tapping a telephone line where there was no physical invasion of the petitioner's premises was held not violative of the Fourth or Fifth Amendments to the Constitution. Discussing *Gouled* the court stated at pp. 463-464:

> "*Gouled v. United States* carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication and must be confined to the precise state of facts disclosed by the record. * * *. A stealthy entrance in such circumstances became the equivalent to an entry by force. There was actual entrance into the private quarters of defendant and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard.
>
> "The Amendment itself shows that the search is to be of material things—the person—the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized."

In *Goldman v. United States*, 316 U.S. 129 (1942), the court held that placing a detectaphone against an office wall in order to listen to conversations taking place in the office next door did not violate the Fourth Amendment, since the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area. In discussing *Olmstead* the court stated that no reasonable or logical distinction could be drawn between the facts in the *Goldman* case and the facts in the *Olmstead* case. The court refused to overrule *Olmstead* but adhered to the opinion there expressed.

In *On Lee v. United States*, 343 U.S. 747 (1952), a federal agent who was acquainted with the petitioner entered petitioner's laundry and engaged him in an incriminating conversation. The agent had a microphone concealed upon his person. Another agent stationed outside with a receiving set was tuned in on the conversation and at the petitioner's trial related what he had heard. These circumstances were held not to constitute a violation of the petitioner's Fourth Amendment rights since no trespass was committed and the agent went into the petitioner's place of business with the consent, if not by the implied invitation, of the petitioner. The court stated that the authority of *Gouled* is sharply limited by *Olmstead*.

In *Silverman v. United States*, 365 U.S. 505 (1961), the eavesdropping was accomplished by means of an unauthorized physical penetration of a recording device into the premises occupied by petitioner. Evidence thus obtained was held violative of the rights guaranteed by the Fourth Amendment. In that case the Supreme Court refused to review its decisions in *Olmstead, Goldman* and *On Lee* but distinguished them on the ground that in those cases there had been no physical intrusion into the premises of the petitioners. The court stated at page 512:

"We find no occasion to reexamine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch."

In *Wong Sun v. United States*, 371 U. S. 471 (1963), verbal incriminating statements made by petitioner, Toy, after his arrest without a warrant and without probable cause were excluded under the inhibition of the Fourth Amendment. In that case Toy operated a laundry. About 6:00 o'clock in the morning federal agents gathered at the laundry. Other federal agents remained nearby, out of sight, when federal agent Wong, who was of Chinese ancestry, rang the bell. When Toy appeared and opened the door, agent Wong told him that he was calling for laundry and dry-cleaning. Toy replied that he didn't open until 8:00 A.M., and told the agent to come back at that time. Toy started to close the door. Agent Wong then took his badge from his pocket and said, "I am a federal narcotics agent." Toy immediately slammed the door and started running down the hallway to his living quarters in the back. Agent Wong and the other federal officers broke open the door and followed Toy into the bedroom where he was arrested. Toy's verbal, incriminating statement was obtained several days afterwards on questioning by a narcotic agent.

In *Lopez v. United States*, 373 U.S. 427 (1963), an agent of the Internal Revenue Service was investigating possible evasion of excise taxes in the area where Lopez conducted an inn. He described Lopez' inn in a report to his superiors as a "potential delinquent." On a return visit to the inn, the agent spoke to Lopez and advised him that he thought the inn would be liable for a carbaret tax and asked to see the books. After further discussion, Lopez gave to the agent a sum of money which, from the context, was a bribe. Lopez asked the agent to return at a later date. The agent reported his meeting with Lopez to his superiors and turned

over the money which he had received. The agent was then instructed to keep the appointment with Lopez, to "pretend to play along with the scheme." The agent was then equipped with two electronic devices, a pocket battery-operated transmitter, (which subsequently failed to work), and a pocket wire recorder which recorded the conversation between Lopez and the agent at his meeting later in the day. The agent suggested that they talk inside Lopez' office and thereafter Lopez engaged in some incriminating conversation while inside his office. The Supreme Court upheld the conviction of Lopez and the introduction into evidence of the agent's testimony regarding his conversations with Lopez, as well as the admissibility of the tape recording of that conversation. Lopez contended that in view of the agent's alleged falsification of his mission, he gained access to Lopez' office by misrepresentation and all evidence obtained in the office was illegally seized. At page 438 the court states:

> "[The agent] was not guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe was not real. Compare *Wong Sun v. United States,* 371 U. S. 471. He was in the office with petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without petitioner's knowledge. Compare *Gouled v. United States, supra.* The only evidence obtained consisted of statements made by Lopez to Davis, statements which Lopez knew full well could be used against him by Davis if he wished. We decline to hold that whenever an offer of a bribe is made in private, and the offeree does not intend to accept, that offer is a constitutionally protected communication."

In *Todisco v. United States,* 298 F. 2d 208 (9th Cir. 1961), C.D. 368 U.S. 989 (1962), appellant, an attorney at law,

was representing a client in attempting to negotiate a compromise settlement of a tax liability as assessed by the tax court. In the course of negotiations, appellant made several statements to a revenue agent assuring him of rewards in the event of a favorable settlement. These overtures were reported by the agent to his superiors. Conversations referred to took place in the appellant's law office during which the agent was equipped with a Fargo device, being a miniature radio transmitter. The conversations in their entirety were transmitted and recorded at the point of reception. The upshot of these conversations was an agreement that upon the agent's acceptance of a settlement, appellant's fee was to be split between them. Appellant contended that the recording of his conversation violated the Fourth and Fifth Amendments of the United States Constitution. This court concluded that no constitutional right of appellant was violated by the manner in which the tapes were secured, or by their admission into evidence. The same result, under a similar state of facts, was reached by this court in *Carbo v. United States,* 314 F. 2d 718 (1963), C.D. 377 U.S. 953 (1964).

Other Circuit Courts of Appeal have held that evidence obtained by law enforcement officers using the subterfuge of hiding their identity in order to pose as members of the general public is admissible. See *United States v. Bush,* 283 F.2d 51 (6th Cir. 1960), C.D. 364 U.S. 942 (1961); *Whiting v. United States,* 321 F.2d 72 (1st Cir. 1963), C.D. 375 U.S. 884 (1963).

In addition to *Gouled v. United States, supra,* and *Wong Sun v. United States, supra,* both of which we have reviewed above, appellant cites the following Federal Court decisions which he claims also support his contentions: *United States v. Mitchneck,* 2 F. Supp. 225 (1933); *Fraternal Order of Eagles v. United States,* 57 F.2d 93 (3rd Cir. 1932); *Gatewood v. United States,* 209 F.2d 789 (D. C. Cir.

1953). We have reviewed the decisions in the cases last cited and find that the facts therein appearing clearly distinguish them from the facts in the instant case.

From our review of the decisions of the Supreme Court which we have cited, we conclude under the circumstances of this case that there was no violation of any Constitutional right upon which appellant relies. We further conclude that the conduct of the law enforcement officers was not "dirty business" or unfair in such a manner as to deprive the appellant of due process.

It appears to us that the conduct of the law enforcement officers in this case was within the permissible "artifice and strategem [which] may be employed to catch those engaged in criminal enterprises." *Sorrells v. United States*, 287 U.S. 435 (1932). See also *Sherman v. United States*, 356 U.S. 369 (1958).

Appellant's contention that the state trial court failed to pass on whether or not there was an unlawful search and seizure is without merit. On several occasions the trial court overruled appellant's objections to the admission of evidence relating to conversations and the recordings thereof. References to questions of the trial court in that connection on one such occasion concerning probable cause for arrest fall short of supporting appellant's contention that the trial court "went off on a tangent" or failed to apply proper constitutional standards in the admission of such evidence.

The remaining contentions of appellant on this appeal, in our view, are no more than attempts to procure a review in this court on questions of California law. No useful purpose would be served by setting forth such contentions in detail. Suffice it to say that appellant asserts the state court misapplied the law relating to the defense of entrapment;[3] that the court erroneously admitted hearsay evi-

[3] The defense was not raised in the trial court.

dence; that it misinterpreted the California Insurance Code; that it did not correctly apply the law of scienter; and that the District Court of Appeals for the State of California relied on a nonexistent "concession".

As stated in *United States of America ex rel. Walter Hall v. People of the State of Illinois*, 329 F.2d 354 (7th Cir. 1964) at page 359:

> "The protections embedded in due process are flexible. As society matures, they change to meet its needs and social goals. When the several states have consistently discharged their responsibility to society in giving full recognition of their constitutional obligation to prevent the prostitution of state judicial power through lawless enforcement of the criminal law, the need for federal intervention is not apparent. To hold otherwise would compel federal intrusion, under the guise of constitutional concern, into the daily operation of the state judicial process. We find no justification for such drastic procedure in the resolution of the case at bar."

The judgment appealed from is affirmed.

APPENDIX D.

California Supreme Court Opinion Disapproving People v. Benson

THE PEOPLE, Plaintiff and Respondent, v. MATIAS ROMERO PEREZ et al., Defendants and Appellants.

Criminal No. 8783 Filed May 21, 1965

APPEAL from judgments of the Superior Court of Yolo County. James C. McDermott, Judge. Reversed.

Prosecution for illegal possession of narcotics. Judgments of conviction reversed.

Joseph A. Martin, Public Defender, and John M. Beede, Deputy Public Defender, for Defendants and Appellants.

Stanley Mosk and Thomas C. Lynch, Attorneys General, Doris H. Maier, Assistant Attorney General, and Raymond M. Momboisse, Deputy Attorney General, for Plaintiff and Respondent.

TRAYNOR, C. J.—Defendants appeal from judgments of conviction entered after a jury found them guilty of possession of marijuana. (Health & Saf. Code, §11530.)

At 11:30 p.m., October 13, 1963, State Narcotics Agent James Shirloh and Woodland Police Officer Glenn Barton entered a hotel room in Woodland pursuant to a search warrant and conducted a search in the presence of defendants Perez and Morales, who occupied the room. Agent Shirloh found a canvas bag and a shopping bag in each of which was a package of marijuana. He found in an ashtray a marijuana cigarette that had been partially smoked. The officers arrested defendants, took them to the police station, and interrogated them. Morales made a statement inconsistent with two statements made by Perez. Perez' statements were inconsistent with each other and with his testimony.

Defendants testified that they came to Woodland on the evening of October 12, 1963, to look for work. They met

a man at a tavern who drove them to a hotel. The man put a package in Perez' canvas bag and carried it and his own shopping bag into the hotel, where he paid for defendants' room. He put the bags on the floor in defendants' room, placed $1.50 on the dresser, and left. Neither defendant looked in the bags or knew that they contained marijuana.[1] Neither of them knew the name of the man, and Morales never saw him again.

Perez testified that the man returned shortly after 7:30 the next evening, while Morales was out. He brought some tobacco cans and cigarette paper, and he rolled and smoked a cigarette that did not smell like an ordinary cigarette. He gave Perez a package and asked him to bring it to him at 9:30 p.m. at a tavern on the ground floor of the hotel. When Perez did so the man gave him $2.00. When Morales returned, Perez told him that he was suspicious and that they had better leave the next day. At 11:30 p.m., however, the officers conducted their search and arrested defendants.

Agent Shirloh had obtained a search warrant on the basis of his affidavit that he had received information from a reliable informer known to him who observed marijuana in defendants' room on October 13th. Defendants sought to have the affidavit admitted into evidence. Upon the prosecution's objection, the court ruled that the affidavit was inadmissible. During the cross-examination of Shirloh, the court also sustained, on the ground of privilege (Code Civ. Proc., § 1881, subd. 5), the prosecution's objection to questions seeking the name of the informer. The court committed prejudicial error in sustaining these objections.

"There is no privilege of nondisclosure [of an informer's identity] if disclosure 'is relevant and helpful to the de-

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[1] In response to Agent Shirloh's interrogation at the police station, however, Perez said that he and Morales "were in on the deal and had agreed to keep the marijuana for the man."

fense of the accused or essential to a fair determination of a cause. . . .' " *(People* v. *McShann,* 50 Cal.2d 802, 807 [330 P.2d 33], quoting *Roviaro* v. *United States,* 353 U.S. 53, 60-61 [77 S.Ct. 623, 1 L.Ed.2d 639].) Thus, when the informer is a material witness on the issue of guilt and the accused seeks disclosure on cross-examination, the People must either disclose his identity or incur a dismissal. *(Roviaro* v. *United States,* 353 U.S. 53, 60-61 [77 S.Ct. 623, 1 L.Ed.2d 639]; *People* v. *McShann,* 50 Cal.2d 802, 808 [330 P.2d 33].) In *Roviaro* v. *United States, supra,* a case that arose under the federal narcotics law, disclosure of an informer's identity was held to be required because the informer "had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. . . . He was the only witness who might have testified to [the defendant's] possible lack of knowledge of the contents of the package [containing the narcotics]. . . ." (353 U.S. at p. 64.) Similarly, in the present case the informer was a participant in the crime if it was he who left the marijuana in defendants' room. *(People* v. *Kiihoa,* 53 Cal.2d 748, 751 [3 Cal. Rptr. 1, 349 P.2d 673]; *People* v. *Williams.* 51 Cal.2d 355, 359-360 [333 P.2d 19]; *People* v. *Alvarez,* 154 Cal.App.2d 694, 696 [316 P.2d 1006].) His testimony might have disclosed an entrapment *(People* v. *McShann,* 50 Cal.2d 802, 810 [330 P.2d 33]; *People* v. *Lawrence,* 149 Cal.App. 2d 435, 451 [308 P.2d 821]), and he was the only person who might have confirmed defendants' testimony that they did not know that the bags in their possession contained marijuana.

It is contended, however, that there is no evidence that the man who left the marijuana in defendants' room was also the informer. There is no merit in this contention. The court improperly refused to consider the affidavit supporting the search warrant, which would have shown that the informer observed marijuana in defendants' room

on October 13th. Perez remained in the room most of that day, and the only person other than defendants known to have been in the room before the officers entered was the stranger alleged to have "planted" the marijuana. Defendants, therefore, showed cause to believe that the stranger was the undisclosed informer. They seek the identity of the informer for the specific purpose of determining if he is the stranger who might be crucial to their defense. They need not prove conclusively before disclosure the very fact they seek to obtain through disclosure. Such certainty of proof is not required as a foundation for obtaining the identity of an informer who might be helpful to the defense of the accused. *(People* v. *Castiel,* 153 Cal. App.2d 653, 659 [315 P.2d 79]; see *People* v. *Riser,* 47 Cal. 2d 566, 587-588 [305 P.2d 1].) The refusal to require such disclosure was prejudicial error.

If defendants are retried, the statements obtained from them while in police custody cannot properly be admitted in evidence over objection, since neither defendant was informed of his right to counsel or of his right to remain silent. *(Escobedo* v. *Illinois,* 378 U.S. 478, 490-491 [84 S.Ct. 1758, 12 L.Ed.2d 977]; *People* v. *Dorado, ante,* pp. 338, 346-347 [42 Cal.Rptr. 169, 398 P.2d 361].) Those rights attach when the criminal "process shifts from investigatoy to accusatory." *(Escobedo* v. *Illinois supra,* 378 U.S. at 492; *People* v. *Dorado, supra, ante,* at pp. 348-349.)

Thus, when the accused has been arrested and the authorities begin a process of interrogation that lends itself to eliciting incriminating statements, the accused is entitled to counsel. *(People* v. *Stewart, ante,* pp. 571, 577 [43 Cal. Rptr. 201, 400 P.2d 97].)

In determining whether the authorities are carrying out such a process of interrogation, we must consider "the length of the interrogation, the place and time of the interrogation, the nature of the questions, the conduct of

the police and all other relevant circumstances." (*People* v. *Stewart, ante*, pp. 571, 579 [43 Cal.Rptr. 201, 400 P.2d 97].)

In the present case, after Agent Shirloh and Officer Barton arrested defendants and took them to the police station, they questioned defendants separately and together, intermittently from midnight until 7 a.m., with the assistance of an interpreter for the Spanish language. Shirloh put questions to both defendants in the form of accusations. He told Perez, for example, that some money marked for identification by the authorities had been found in his possession when he was arrested, and then asked him to reconsider his answers in light of such accusation. Shirloh testified that he repeatedly showed Perez photographs of a man because he "wanted to have on record . . . statements by him, pointed statements, [that] he did not know this man." Both Perez and Morales made statements during these predawn sessions. That afternoon, Shirloh, Barton, and a deputy district attorney took turns questioning Perez and elicited another statement. It is thus clear that the authorities were carrying out a process of interrogation to elicit incriminating statements and that the statements obtained from both defendants are therefore inadmissible. (*People* v. *Stewart, ante*, pp. 571, 579 [43 Cal. Rptr. 201, 400 P.2d 97].) Accordingly, we need not discuss Perez' contention that the statements made by him were involuntary and for that reason inadmissible.

There is no merit in defendants' contention that the trial court erroneously refused to give an instruction on the defense of entrapment. There was no evidence that the man defendants allege "planted" the marijuana was a law enforcement officer or someone acting in cooperation with the authorities. (*Sherman* v. *United States*, 356 U.S. 369, 373-375 [78 S.Ct. 819, 2 L.Ed.2d 848].) If such evidence is presented upon retrial, however, an entrapment instruction would be appropriate. We disagree with the Attorney

General's contention that to invoke the defense of entrapment a defendant must admit committing the criminal acts charged. Although the defense is available to a defendant who is otherwise guilty *(People* v. *Benford,* 53 Cal.2d 1, 9 [345 P.2d 928]), it does not follow that the defendant must admit guilt to establish the defense. A defendant, for example, may deny that he committed every element of the crime charged, yet properly allege that such acts as he did commit were induced by law enforcement officers. *(People v. West,* 139 Cal.App.2d Supp. 923, 926 [293 P.2d 166]; *Henderson* v. *United States* (5th Cir.) 237 F.2d 169, 173.) Moreover, a defendant may properly contend that the evidence shows unlawful police conduct amounting to entrapment without conceding that it also shows his guilt beyond a reasonable doubt. When the evidence does show such conduct, the court has a duty to root its effects out of the trial upon its own initiative if necessary. (See *Sorrells* v. *United States,* 287 U.S. 435, 453, 457 [53 S.Ct. 210, 77 L.Ed. 413, 86 A.L.R. 249] [Roberts, J., concurring].) Entrapment is recognized as a defense because "the court refuses to enable officers of the law to consummate illegal or unjust schemes designed to foster rather than prevent and detect crime." *(People* v. *Benford,* 53 Cal. 2d 1, 9 [345 P.2d 928]; see *People* v. *Cahan,* 44 Cal.2d 434, 445-446 [282 P.2d 905, 50 A.L.R.2d 513].) A rule designed to deter such unlawful conduct cannot properly be restricted by compelling a defendant to incriminate himself as a condition to invoking the rule. Thus, the defendant may challenge the legality of a search and seizure without admitting that the property seized was taken from him and without asserting a proprietary interest in the premises entered. *(People* v. *Ibarra,* 60 Cal.2d 460, 465 [34 Cal.Rptr. 863, 386 P.2d 487]; *People* v. *Martin,* 45 Cal.2d 755, 759-761 [290 P.2d 855].) To compel a defendant to admit guilt as a condition to invoking the

defense of entrapment would compel him to relieve the prosecution of its burden of proving his guilt beyond a reasonable doubt at the risk of not being able to meet his burden of proving entrapment. To put the defendant in that dilemma would frustrate the assertion of the defense itself and would thus undermine its policy. (See *People* v. *West,* 139 Cal.App.2d Supp. 923, 926 [293 P.2d 166]; *Henderson* v. *United States* (5th Cir.) 237 F.2d 169, 172-173; 1 Witkin, Cal. Crimes (1963) p. 169; 73 Harv.L.Rev. 1333-1343; 70 Harv.L.Rev. 1302; 30 So.Cal.L.Rev. 542.) Statements to the contrary in the cases cited in the margin are disapproved.[2]

The judgments are reversed.

Peters, J., Tobriner, J., Peek, J., and Burke, J., concurred.

McComb, J., and Schauer, J.,* concurred in the judgment.

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[2] *People* v. *Herrera*, 232 Cal.App.2d 558, 559 [43 Cal.Rptr. 12]; *People* v. *Herrera*, 232 Cal.App.2d 561, 563 [43 Cal.Rptr. 14]; *People* v. *Adams*, 213 Cal.App.2d 536, 540 [29 Cal.Rptr. 57]; *People* v. *Sherman*, 211 Cal.App.2d 419, 426 [27 Cal.Rptr. 353]; *People* v. *Benson*, 206 Cal.App.2d 519, 532 [23 Cal.Rptr. 908]; *People* v. *Diaz*, 206 Cal.App.2d 651, 671 [24 Cal. Rptr. 367]; *People* v. *Spencer*, 193 Cal.App.2d 13, 18 [13 Cal.Rptr. 881]; *People* v. *Polsalski*, 181 Cal. App.2d 795, 801 [5 Cal.Rptr. 762]; *People* v. *Lollis*, 177 Cal.App.2d 665, 670 [2 Cal.Rptr. 420]; *People* v. *Jones*, 176 Cal.App.2d 743, 749 [1 Cal.Rptr. 637]; *People* v. *Tillman*, 142 Cal.App.2d 404, 407 [298 P.2d 631]; *People* v. *Cummings*, 141 Cal.App.2d 193, 201 [296 P.2d 610]; *People* v. *Evans*, 134 Cal.App. 2d 733, 737 [286 P.2d 368]; *People* v. *Schwartz*, 109 Cal.App.2d 450, 455-456 [240 P.2d 1024]; *People* v. *Johnson*, 99 Cal.App.2d 559, 562 [222 P.2d 58]; *People* v. *Gelardi*, 77 Cal.App.2d 467, 477 [175 P.2d 855]; *People* v. *Grijalva*, 48 Cal.App. 690, 694 [121 P.2d 32]; *People* v. *Lee*, 9 Cal.App.2d 99, 109 [48 P.2d 1003].

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

APPENDIX E.

Opinion That People v. Benson Was Square Holding Wrongfully Denying Standing To Assert Entrapment

THE PEOPLE, Plaintiff and Respondent, v. ROBERT BERNARD MARSDEN, Defendant and Appellant.
Criminal No. 10097 filed June 7, 1965

APPEAL for a judgment of the Superior Court of Los Angeles County. Maurice C. Sparling, Judge. Reversed.

Prosecution for giving away marijuana. Judgment of conviction reversed.

Patrick Kerrigan, under appointment by the District Court of Appeal, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Mitchell Shapiro, Deputy Attorney General, for Plaintiff and Respondent.

KINGSLEY, J. — Defendant was charged with a violation of Health and Safety Code, section 11531 (sale, furnishing or giving away a narcotic). Three prior felonies (none involving narcotic offenses, and the latest about nine years previously) were charged and admitted. After a jury trial, defendant was found guilty as charged. Application for probation was waived, no motion for new trial was made; defendant was sentenced to prison for the term prescribed by law, the sentence to run concurrently with time owed on his prior felonies. He has appealed from the judgment.

The sole evidence against defendant was that of an undercover police officer who testified that he was introduced to defendant by an informer named "Mickey." After the introduction, on several occasions, the officer sought to buy narcotics from defendant, but was rebuffed, defendant saying that "he did not have any." On the final occasion, the officer sought out defendant in a bar and again asked for

marijuana, saying that he had a date with a new girl friend and wanted some marijuana to use with her. Thus importuned, defendant went to his car and returned with a single, hand-rolled marijuana cigarette (worth 50 cents) and gave it to the officer.

Defendant testified, telling substantially the same story as the officer, but claiming that he had, on this as on the previous occasions, rejected the officer's request and left the bar without further contact.

I

Defendant's contention that the evidence is not sufficient to support the conviction is clearly without merit. It is true that the officer's testimony on direct and on cross-examination contained some inconsistencies. But these, at the most, went only to the weight of his testimony — a matter on which the jury's determination is conclusive.

II

Defendant contends, also, that the sentence prescribed by statute (five years to life without possibility of parole for three years), imposed for the gift of a single marijuana cigarette by a person not shown to have had any other involvement with the narcotic traffic and in a case in which, as we discuss later, elements of entrapment were present, is so excessive as to constitute "cruel and unusual" punishment within the ban of the state and federal Constitutions.

The penalty herein involved was enacted as part of a comprehensive reexamination of the narcotic laws of this state in 1961. The penalty, as against the background of this particular case, may seem harsh; but the Legislature necessarily deals with criminal activity by classes and not by cases, and we cannot say that the statutory penalty is excessive for the offense of dealing in marijuana as a class of crimes.

III

Defendant urges, as his main point, that the evidence showed the existence of the defense of entrapment and that the court erred in not instructing on that issue.

The defense of entrapment has been stated as follows: "The defense of entrapment is available where the crime was not contemplated by the defendant, but was actually planned and instigated by police officers, and the defendant was by persuasion or fraud lured into its commission." (1 Witkin, Cal. Crimes (1963) § 174, p. 165.)

The cases in this and other jurisdictions draw a distinction between situations where the idea of the crime originated with the police officer and those where, although the opportunity to commit the particular offense originated with the officer, the defendant stood ready and willing to commit similar offenses when, as and if an opportunity arose. Normally, the cases place emphasis on the presence or existence of unusual inducement or persuasion on the part of the officer. (See the cases cited in 1 Witkin, Cal. Crimes (1963) § 176, pp. 168-169.)

Tested by these rules, we conclude that the evidence in this case was such as to permit the jury, properly instructed, to find that this defendant was the victim of entrapment. The People's own evidence discloses all of the classic elements of an entrapment: An original contact initiated solely by the police; repeated, and unsuccessful, attempts to consummate a sale by the use of ordinary methods of offers to purchase; a final appeal to friendship with a story of special urgency; a consummation effected only as a result of such abnormal pressure. In addition, the whole operation resulted in a gift, and not a sale, of a single item of narcotic, rather than a sale in commercial quantities. While these factors may not show entrapment as a matter of law, they were sufficient to permit the jury to find that the ultimate gift was the result of a concept originating with

the officer and not with the defendant and that, in the words of Mr. Chief Justice Warren, the officer was engaged in the "manufacturing of crime" rather than in the apprehension of a criminal. (See *Sherman* v. *United States* (1958) 356 U.S. 369 [78 S.Ct. 819, 2 L.Ed.2d 848].)

However, the Attorney General argues: (1) that no request for such an instruction was made; and (2) that defendant was barred from relying on the defense in a case where he had denied committing the offense at all.

Neither contention is valid. The Attorney General refers us to the case of *People* v. *Lee* (1935) 9 Cal.App.2d 99 [48 P.2d 1003]. In that case, although the actual holding was that the evidence was not sufficient to raise an issue of entrapment, the court, by way of dicta, announced the rule that entrapment could be urged only when the defendant admitted the offense. That dicta was followed by similar dicta in a long line of cases extending over twenty years;[1] and by square holdings to that effect in two cases, one from this district (*People* v. *Benson* (1962) 206 Cal.App.2d 519, 532 [23 Cal. Rptr. 908]; *People* v. *Herrera* (1965) 232 Cal. App.2d 558, 559 [43 Cal.Rptr. 12]). It was not until after

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[1] *People* v. *Braddock* (1953) 41 Cal.App.2d 794, 803 [264 P.2d 521]; *People* v. *Scott* (1960) 186 Cal.App.2d 661, 668 [9 Cal.Rptr. 75]; *People* v. *Polsalski* (1960) 181 Cal.App.2d 795, 801 [5 Cal. Rptr. 762]; *People* v. *Lollis* (1960) 177 Cal.App.2d 665, 670 [2 Cal.Rptr. 420]; *People* v. *Tillman* (1956) 142 Cal.App.2d 404, 407 [298 P.2d 621]; *People* v. *Cummings* (1956) 141 Cal.App.2d 193, 200-202 [296 P.2d 610]; *People* v. *Schwartz* (1952) 109 Cal.App.2d 450 [240 P.2d 1024]; *People* v. *Johnson* (1950) 99 Cal.App.2d 559 [222 P.2d 58]; *People* v. *Lindsey* (1949) 91 Cal.App.2d 914, 918 [205 P.2d 1114]; *People* v. *Gelardi* (1946) 77 Cal.App.2d 467, 477 [175 P.2d 855]; *People* v. *Billingsley* (1943) 59 Cal. App.2d Supp. 845, 847-848 [139 P.2d 362]; *People* v. *Grijalva* (1941) 48 Cal.App.2d 690, 694 [121 P.2d 32].

In *People* v. *Diaz* (1962) 206 Cal.App.2d 651, 671 [24 Cal.Rptr. 367], where the *Lee* case is also cited, the trial court had instructed on the defense; the contention, rejected on appeal, was that the evidence showed entrapment as a matter of law; the present issue was not before the court. In *People* v. *Herrera* (1965) 232 Cal.2d 561 [43 Cal.Rptr. 14], the evidence was admitted but the jury convicted.

this case was tried, and in fact after it was argued here, that this doctrine was rejected by the Supreme Court (*People* v. *Perez,* 62 Cal.2d 769 [44 Cal.Rptr. 326, 401 P.2d 934], decided May 21, 1965). In the then state of the decisions in this state, a request for an entrapment instruction would have been futile, and the failure to request one is not now fatal. (*People* v. *Kitchens* (1956) 46 Cal.2d 260 [294 P.2d 17].)

But the doctrine of *People* v. *Lee, supra,* 9 Cal.App.2d 99, long a subject of attack in this state (see I Witkin, California Crimes, § 177, pp. 169-170; 30 So. Cal. L. Rev. 542, 544-545), has now been rejected in *People* v. *Perez, supra,* 62 Cal.2d 769, and defendant is entitled to have the possibility of entrapment explored under proper instructions.

The judgment is reversed.

Files, P. J., and Jefferson, J., concurred.

APPENDIX F.

State Court Judgment Sought To Be Reviewed

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF CALIFORNIA IN AND FOR THE
SECOND APPELLATE DISTRICT

MINUTES OF DIVISION THREE

December 10, 1965

Crim. No. 11607 In re Benson on Habeas Corpus

THE COURT: Petition for writ of habeas corpus denied.